

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



V

**Richard Fournier**

**DECISION OF THE HEARING OFFICER**

**Appearances:** Mark D. Wiseman, Esq., representing Richard Fournier

**Nature of Dispute:** RSA 275-E:2 I (a), illegal termination for protected reporting  
RSA 275-E:3, illegal termination for protected refusal to execute  
an illegal directive

**Employer:** Richard Fournier, 31 Dunbarton Road, Bow, NH 03304

**Date of Hearing:** July 18, 2011

**Case No.:** 41582

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant alleges that he was illegally terminated on January 18, 2010, because he reported to his employer that it was illegal to drive the truck in excess of the number of hours allowed by federal law, and because he refused to make the run that he determined would cause him to be in violation of federal law. The claimant offered no evidence other than his testimony. He requests, as relief in this action, back wages less unemployment compensation received, in the total amount of \$6,866.88.

The employer states that the claimant did not raise either of these issues on January 18, 2010, but rather the claimant refused to come in to work that day and was subsequently fired for not reporting to work.

**FINDINGS OF FACT**

The claimant worked as an over the road driver for the employer.

The claimant had a telephone conversation with the employer on January 18, 2010, which resulted in his termination. The parties disagree as to the reason for his termination.

**DISCUSSION AND CONCLUSIONS**

As required by Appeal of Mary Ellen Montplaisir 147 N.H. 297 (2001), this Department is required to apply a "mixed motive analysis" on the evidence presented. Because of the

circumstantial nature of the evidence alleged by the claimant, the analytical framework of a "pretext analysis" is appropriate. Under this analytical framework, the claimant has the initial burden of establishing a *prima facie* case of unlawful conduct/retaliation. This requires the claimant to show:

1. he engaged in an act or acts protected by the statute;
2. he suffered an action proscribed by the statute (termination); and
3. there was a causal connection between the protected acts he engaged in and the action he suffered as a result of those protected acts (termination).

The establishment of a *prima facie* case creates a presumption that the employer unlawfully retaliated against the claimant. The burden of proof then shifts to the employer to rebut the claimant's assertions with evidence that their action was taken for legitimate, non-retaliatory reason(s). This burden of proof is only one of production. The claimant retains the burden of proof to persuade. In response to the employer's rebuttal, the claimant has the opportunity to show that the proffered legitimate, non-retaliatory reason for the action was not the true reason for the unlawful conduct/retaliation, and that his assertion was the true reason for the unlawful conduct/retaliation. The claimant can show this by establishing that the employer's proffered reason for the action is either not credible, or by directly showing that the action was more likely motivated by retaliation in response to his protected act/s.

The claimant established a *prima facie* case of illegal termination for the reporting of and refusal to participate in, a protected act, specifically, for reporting that driving in excess of hours allowed by federal regulations was illegal and refusing to do so. The claimant alleges he notified the employer that driving in excess of the hours allowed by federal regulations was illegal and refused to drive in excess of the hours allowed by the federal regulation, and was subsequently terminated. There is a causal connection, between both his alleged protected reporting and his alleged protected refusal to execute an illegal directive, to his termination.

The employer effectively rebuts the claimant's *prima facie* case of illegal termination with his persuasive testimony that the claimant refused to report to work as he needed to stay home with his wife who was ill, and that this action was the reason for his termination.

The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he was terminated for his protected acts, for reporting that driving in excess of hours allowed by federal regulations was illegal and refusing to drive in excess of the allowable hours. The claimant testified as credibly, not more credibly, than the employer. The Hearing Officer finds that the claimant failed to meet that burden of proof as his story is only as credible as, not more credible than, the employer's. Therefore, the claimant fails to show that the employer's proffered legitimate, non-retaliatory reason for his termination was not the true reason for the termination, and that his assertions were the true reason for the termination. The claimant fails to establish that the employer's proffered reason for the action is either not credible, or that the termination was more likely motivated by retaliation in response to his protected act(s).

The Hearing Officer finds the claimant failed to prove by a preponderance of the evidence that he was terminated in contravention of any portion of the Whistleblowers' Protection Act.

**DECISION**

Based on the testimony and evidence presented, as this Department finds that the claimant failed to prove by a preponderance of the evidence that he was terminated in retaliation for his protected reporting and because of his protected refusal to execute an illegal directive, it is hereby ruled that the Whistleblower's Claim is invalid.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: August 10, 2011

Original: Claimant  
cc: Employer

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MJD/all